

COPY

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERT B. BARBOSA,

Petitioner-Appellant,

v.

RENCE E. WILSON, Warden,
ifornia State Prison,
Quentin, California, et al.,

Respondent-Appellee.

No. 21132

BRIEF OF APPELLEE

FILED

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1 IN THE UNITED STATES COURT OF APPEALS

2 FOR THE NINTH CIRCUIT

3
4 ALBERT B. BARBOSA,

5 Petitioner-Appellant,

6 v.

7 LAWRENCE E. WILSON, Warden,
California State Prison,
8 San Quentin, California, et al.,

9 Respondent-Appellee.

No. 21132

10
11 BRIEF OF APPELLEE

12 JURISDICTION

13 The jurisdiction of the United States District
14 Court to entertain appellant's petition for a writ of habeas
15 corpus was conferred by Title 28, United States Code sections
16 2241, 2242 and 2243. The jurisdiction of this Court is
17 conferred by Title 28, United States Code section 2253, which
18 makes a final order in a habeas corpus proceeding reviewable
19 in the Court of Appeals when a certificate of probable cause
20 has issued.

21 STATEMENT OF THE CASE

22 A. Proceedings in the state courts.

23 Appellant, Albert Barbosa, was convicted of violating
24 section 11501 of the Health and Safety Code, to wit: trans-
25 portation or sale of a narcotic other than marijuana, after
26 a trial by jury during which he was represented by the public

1 defender; on May 24, 1962, he was sentenced to state prison
2 for the term of ten years to life (CT 2-8).*

3 Appellant did not appeal the conviction (CT 2).
4 However, petitions for habeas corpus were filed in the
5 Superior Courts of Los Angeles County, in the Superior Court
6 of Marin County, and in the Supreme Court of the State of
7 California (CT 5).. The petition for writ of habeas corpus
8 in the Los Angeles County Superior Court was denied, according
9 to petitioner, because it was not properly prepared, and the
10 petitions in the Marin County Superior Court and the Supreme
11 Court of California were denied on June 25, 1965, and October
12 1965 respectively (CT 6). Substantially the same factual and
13 legal issues presented to the District Court were raised in
14 those petitions (CT 6).

15 B. Proceedings in the federal courts.

16 On December 21, 1965, appellant filed an application
17 for a writ of habeas corpus in the United States District Court
18 for the Northern District of California, Southern Division
19 (CT 1-30). On December 20, 1965, the District Court denied
20 the petition on the grounds that appellant had not recited
21 any facts in support of his "bare allegation" that he was
22 inadequately represented by counsel, and that the prior
23 offense for which petitioner was placed on probation for five

24
25 * As hereinafter used, "CT" refers to the transcript of
26 record filed in this Court, constituting the United States
District Court Clerk's record on appeal.

1 years, conditional upon his serving one year in the county
2 jail, was nonetheless a felony under California Penal Code
3 section 17 (CT 30-31).

4 The same arguments, i.e., inadequate representation
5 of counsel and improper use of a prior conviction in sentencing
6 appellant, were again presented to the District Court in a
7 petition for rehearing (CT 32-48). The court treated the
8 petition for rehearing as a new petition for habeas corpus
9 and, after exhaustive analysis, again rejected the contentions
10 raised by appellant (CT 49-52). However, the court did grant
11 appellant's motion for leave to appeal its order dismissing
12 the petition for habeas corpus and permitted him to proceed
13 in forma pauperis, pursuant to Title 28, United States Code
14 section 1915 (CT 64).

15 SUMMARY OF APPELLEE'S ARGUMENT

16 Appellant's attack upon the use of his prior
17 narcotics conviction to increase his present term is not
18 supported by the law.

19 ARGUMENT

20 In his appeal from the District Court's denial of
21 his petition for a writ of habeas corpus, appellant again
22 asserts that he was improperly sentenced as having suffered
23 a prior felony conviction since his first narcotics conviction
24 resulted in a county jail sentence (AOB 3-4). Appellant
25 argues that to use his prior narcotics conviction to increase
26 his subsequent narcotics conviction is an ex post facto



1 application of the law, cruel and unusual punishment, and
2 a denial of due process and equal protection of the law
3 (AOB 2-9). None of these arguments is supported by the law.

4 It has been uniformly held that statutes that
5 provide for an increased penalty for subsequent offenses do
6 not result in double jeopardy or cruel or unusual punishment.
7 Beland v. United States, 128 F.2d 795, 797 (5th Cir. 1942);
8 People v. MacDaniels, 165 Cal.App.2d 283, 286 (1958). Nor
9 do such statutes violate the due process or equal protection
10 provisions of either the federal or state constitutions.
11 Id. at 286; People v. Dutton, 9 Cal.2d 505, 507 (1937); In re
12 Rosencrantz, 205 Cal. 534, 537-40 (1928). Neither is the
13 use of a prior narcotics conviction to increase a subsequent
14 narcotics sentence an ex post facto application of the law.
15 Statutes imposing aggravated penalties upon persons who have
16 been previously convicted of crime have long been recognized
17 in this country and in England; by such statutes habitual
18 criminals are not punished for their earlier offense, "but
19 the repetition of criminal conduct . . . justifies heavier
20 penalties when they are again committed." Graham v. West
21 Virginia, 224 U.S. 616, 623 (1912); Beland v. United States,
22 128 F.2d 795, 797 (5th Cir. 1942), cert. denied 317 U.S. 676,
23 rehearing denied 317 U.S. 710.

24 It is unquestionably clear that the Legislature
25 has determined that prior narcotics offenders should be
26 punished more severely than first offenders (e.g., Health

1 and Safety Code §§ 11500, 11501, 11502, 11530, 11531, 11532,
2 11540, 11557, 11715.6), and the constitutionality of punishing
3 recidivists more severely than first offenders has long been
4 established. Graham v. West Virginia, supra; McDonald v.
5 Massachusetts, 180 U.S. 311 (1901); Sherman v. United States,
6 241 F.2d 329, 335-36 (9th Cir. 1957), cert. denied 354 U.S.
7 711; People v. d A Philippo, 220 Cal. 620 (1934), cert. denied
8 293 U.S. 614; People v. Hainline, 219 Cal. 532 (1933);
9 People v. Stanley, 47 Cal. 113 (1873); Ex parte Gutierrez,
10 45 Cal. 429 (1873). Hence, appellant's allegations that he
11 is being placed twice in jeopardy by sentencing him as a
12 recidivist, that such sentence is an ex post facto application
13 of the law, cruel and unusual punishment, and a denial of
14 due process and equal protection of the laws, must be rejected
15 as sham, frivolous and devoid of merit.

16 CONCLUSION

17 For the reasons stated, it is respectfully submitted
18 that the order of the District Court denying appellant's petition
19 for writ of habeas corpus be affirmed.

20 Dated: September 29, 1966.

21 THOMAS C. LYNCH, Attorney General
22 of the State of California

23 ROBERT R. GRANUCCI,
24 Deputy Attorney General

25 HORACE WHEATLEY,
26 Deputy Attorney General

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CERTIFICATE OF COUNSEL

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I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

Dated: San Francisco, California

September 29, 1966

HORACE WHEATLEY
Deputy Attorney General
of the State of California

